88-341

Supreme Court, U.S.
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No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1988.

JOHN J. GILLIES, JR.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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QUESTION PRESENTED

Whether the element of §922(g) of the Firearm Owners Protection Act of 1986, which criminalizes the possession "in or affecting commerce" of a firearm by a convicted felon is merely a "jurisdictional term of art" or whether the statute requires, by its own terms, proof of present possession "in or affecting commerce"?

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No.

IN THE SUPREME COURT
OF THE UNITED STATES

JOHN J. GILLIES, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals, United States v. John J. Gillies, Jr., No. 87-1704, is not yet reported. (Appendix).

JURISDICTION

The decision below issued on July 7, 1988. A motion to stay issuance of the mandate was filed on July 28, 1988 and denied. This petition is filed within

sixty days of the date of decision. The jurisdiction of this court is claimed under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. §922(g) (1982 & Supp. IV 1986), as amended by the Firearm Owners' Protection Act of 1986:

> It shall be unlawful for any any person--
>
> (1) who has been convicted . . . of a crime punishable by imprisonment for a term exceeding one year;
>
> . . .
>
> to ship or transport in interstate or foreign commerce, any firearm or ammunition; or to possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

Petitioner, John J. Gillies, Jr., was indicted by the grand jury for the District of Massachusetts in one count, as follows:

> . . . having been previously convicted of three or more violent felonies, as that term is defined in 18 U.S.C. §924 (e)(2), did knowingly possess a firearm, that is, a Rossi .38 caliber revolver, with serial number D355291 which had previously traveled in interstate commerce. All in violation of Title 18, United States Code, Sections 922 (g) and 924(e).

Gillies filed a motion to dismiss which was denied and after a jury-waived trial, he was convicted of violation of §922(g) and a mandatory sentence was imposed pursuant to §924(e). The conviction was affirmed on appeal. (Appendix).

STATEMENT OF FACTS

On the alleged substantive violation of §922(g), a Massachusetts State Trooper testified that on December 23, 1986, he had stopped the defendant for operating his vehicle in an erratic fashion; he recalled that Gillies was a known drug trafficker, on calling his barracks he was informed that Gillies' driver's license was suspended and that he might be carrying a weapon. A subsequent search of Gillies revealed a loaded revolver in his pocket.

The government introduced testimony that the gun had been imported by a licensed firearm import firm from Brazil and sold to a Florida firm in 1977. There was no evidence that Gillies had any

connection to the weapon at the time in which it moved through commerce.

The defendant moved for judgment of acquittal as a matter of law which was denied and the defendant was found guilty.

REASONS FOR GRANTING THE WRIT

1. THE CONSTRUCTION PLACED UPON A CRIMINAL STATUTE BY THE COURT BELOW IS IN FUNDAMENTAL CONTRADICTION WITH THE PRINCIPLES OF STATUTORY CONSTRUCTION APPLIED TO A CRIMINAL STATUTE BY THIS COURT.

The court below rejected petitioner's contention that the unambiguous language of the statute rendered criminal the present possession in or affecting commerce, of a firearm by a convicted felon (or any person falling into one of the enumerated categories of §922(g)). In doing so, the court based its ruling on decisions by this Court

recognizing the broad reach of Congressional jurisdiction to enact legislation regulating entities involved in interstate commerce. See e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). The power of Congress to enact legislation based upon the Commerce Clause is not however, at issue. The issue is the proper and strict construction to be placed upon a criminal statute. Rather than strictly construing the statute and honoring the language chosen by Congress, the Court below rendered meaningless the limitation "in or affecting commerce" and gave no recognition to the fact that Congress had delineated two separate offenses each requiring a different nexus with commerce, i.e., receipt of a firearm which had

formerly been shipped in interstate commerce and present possession "in or affecting commerce." The decision below is totally at odds with historic principles of statutory construction.

Most recently in McNally v. United States, 483 U.S. ____, 107 S.Ct.2875, 97 L.Ed.2d 292 (1987), this Court, strictly construing the scope of 18 U.S.C. §1341 (federal mail fraud statute), applied the time-honored rule of statutory construction that:

> when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. United States v. Bass, 404 U.S. 336, 347 (1971); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-222 (1952). See also Rewis v. United States,

401 U.S. 808, 812 (1971).

McNally at 107 S.Ct. 2881.

This principle of statutory construction coupled with the basic principle that if the language of a statute is unambiguous, it is to be regarded as conclusive unless there is, "a clearly expressed legislative intent to the contrary," (Consumer Product Safety Comm. v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)) clearly conflicts with the admittedly expansive reading of the statute by the court below.

The court below, it is submitted, has confused the question, which had not been raised, whether Congress had a jurisdictional basis for enacting §922(g) with the question whether the clear language of the statute makes present

possession, "in or affecting commerce" a necessary element of the offense.

The court below dismissed the phrase which modifies or limits the element of "possession" to "in or affecting commerce" as mere "jurisdictional words of art". Presumably, the court meant Congress had exercised its jurisdiction under the Commerce Clause to enact §922(g) and that Congress had broad regulatory powers. The power to enact the statute is not disputed. However, expansive power to regulate a certain class of activities does not support expansive interpretations of criminal statutes, as the court below assumed. The clear and unambiguous terms of the statute make it criminal for an individual, who possesses certain characteristics, such as a convicted

felon, to possess, in or affecting commerce, a firearm. It also criminalizes the receipt by such an individual, of a firearm which has been shipped or transported The petitioner was not charged with receipt.

The court below rendered meaningless the distinction wrought by Congress in criminalizing two different acts, receipt and possession. This approach further conflicts with another basic principle of statutory construction, that each provision of a statute should be construed so as to give full effect to each. United States v. Rawlings, 821 F.2d 1543 (11th Cir. 1987).

Moreover, the reliance of the Court below on Scarborough v. United States, 431 U.S. 563 (1977) is misplaced.

In Scarborough this court granted certiorari to resolve the ambiguities of that provision of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. App. §1202(a);" making it a crime for a person convicted of a felony to receive, possess or transport in commerce or affecting commerce . . . any firearm." In light of the ambiguities of the statute the Court looked to the legislative history of Title VII in determining that the Congress intended to require only the minimal nexus with commerce, i.e., that the firearm had been, at some time, in interstate commerce. Scarborough, at 575.

The instant statute is not ambiguous, and resort to the legislative history of a different statute is

inappropriate under these circumstances. See United States v. Bass, 404 U.S. 336, 344 (1971); Thrall v. Wolfe, 503 F.2d 313, 318 (7th Cir. 1974).

The instant case is properly resolved under the rationale of Barrett v. United States, 423 U.S. 212 (1976). In Barrett this Court was called upon to construe 18 U.S.C. §922(h) providing that it is unlawful for certain categories of persons, "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." This Court found no ambiguity. The language of the statute encompasses the receipt of a firearm; there is no limiting or modifying language, i.e., the statute does not say, "receipt in or affecting commerce." Moreover, the

proscribed act "receipt" is in the present tense; the interstate commerce reference denotes an act that has been completed; i.e., the present perfect tense, "which has been shipped . . . "

Applying the same straight forward analysis to the instant statute: the interstate component modifies the term "possess"; it is in the present tense, "to possess in or affecting commerce"; there is no language from which it could be inferred that the reference to commerce referred to a completed act (that language is reserved for the crime of receipt). Thus, under the appropriate, strictly textual analysis, there is no ambiguity in the words of §922(g) and the expansive reading of §922(g), resting upon reference to the legislative history of a

distinct and ambiguous statute, is totally at odds with the principles of statutory construction enunciated by this Court.

II. THE CONSTRUCTION PLACED UPON §922(g) BY THE COURT BELOW IS INCONSISTENT WITH THE CONSTRUCTION ACCORDED BY THIS COURT AND OTHER CIRCUITS TO RELATED CRIMINAL STATUTES JURISDICTIONALLY BASED UPON THE COMMERCE CLAUSE.

Assuming that Congress intended to have the instant statute broadly construed, the unambiguous language it chose must be accorded its normal meaning and its limitations given effect. In an analogous situation the Second Circuit was called upon to interpret 18 U.S.C.A. §844(l) of the Organized Crime Control Act which penalized the use of explosives to destroy, "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign

commerce . . . . " In United States v. Mennuti, 639 F.2d 107 (2nd Cir. 1981), the court gave meaning to the term "affecting commerce" and recognized that Congress had indeed limited the reach of the statute, by its own terms, "to property currently used in commerce or in an activity affecting it . . . . " Mennuti at 113.

This Court reaffirmed that principle in Russell v. United States, 471 U.S. 858, 862 (1985) ("By its terms, . . . the statute only applies to property that is 'used' in an 'activity' that affects commerce"). Similarly, the instant statute applies, by its terms to present possession "in or affecting commerce".

This same approach has been taken with regard to the interstate commerce component of the Travel Act, 18 U.S.C. §1952 which prohibits interstate travel in furtherance of cetain criminal activities. In contrast to the position taken by the court below, several circuits have accorded substantial weight to the nexus which must be demonstrated between criminal activity and interstate travel or commerce. See gen. United States v. Hawthorne, 356 F.2d 740, 741 (4th Cir. 1966), cert. denied, 86 S.Ct. 1344 (1966)(essential element of the crime is the interstate travel of the offender himself); United States v. O'Dell, 671 F.2d 191, 193 (6th Cir. 1982) (if the nexus between the defendants' criminal activity and interstate commerce becomes

too tenuous or indirect, the Act does not apply).

In United States v. Markowski, 772 F.2d 358, 365 (7th Cir. 1985), in interpreting the Comprehensive Drug Abuse Prevention and Control Act of 1970, the Court required that the interstate component (travel) must relate significantly, not merely incidentally to the illegal activity. Unlike the court below, each of these circuit courts of appeal have followed the dictates of this Court in according true significance to the interstate commerce component of criminal (not merely regulatory) statutes; they have looked to the statutory language and where construing the ambit of a criminal statute applied the rule of

lenity. See Rewis v. United States, 401 U.S. 808, 812 (1971).

The court below, it is submitted, followed none of these basic rules of statutory construction and as a result has rendered ambiguous what Congress had clearly stated.

CONCLUSION

For the reasons stated above the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1704

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN J. GILLIES, JR.,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. John J. McNaught, U.S. District Judge]

Before

Bownes, Breyer and Torruella,

Circuit Judges.

Barbara A.H. Smith with whom Davis, Robinson & Smith was on brief for appellant.

S. Theodore Merritt, Assistant United States Attorney, with whom Frank L. McNamara, Jr., United States Attorney, was on brief for appellee.

July 7, 1988

BREYER, Circuit Judge. After a "jury-waived" trial, a federal district court judge convicted the appellant, James J. Gillies, Jr., of violating federal laws that provide strict punishments for previously convicted felons who possess firearms. 18 U.S.C. §§922(g)(1) (1982 & Supp. IV 1986) (see Appendix A); 924(e) (1982 & Supp. IV 1986) (see Appendix B). Gillies, in this appeal, makes several, rather technical, arguments: that his conduct falls outside the letter of the statute; that the indictment was defective; that the government failed to prove three prior convictions. We have found these arguments unconvincing.

1. Gillies claims that the relevant substantive statutory language does not cover his conduct. The statute, in relevant part, makes it:

> unlawful for any person -
>
> (1) who has been convicted . . . of a crime punishable by imprisonment for a term exceeding one year;
>
> . . .
>
> to ship or transport in interstate or foreign commerce, any firearm or ammuniction; or to possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

§922(g) (emphasis added). The evidence showed that Gillies, on December 23, 1986, possessed, in Massachusetts, a gun that, in 1977, had travelled from Brazil to

Florida. Gillies says that this evidence does not show that he "possess[ed] in or affecting commerce, any firearm." In his view, the underlined words "affecting commerce" have a limited meaning; they do not cover simple in-state possession of a gun that, sometime in the past, arrived from out of state. We do not agree.

For one thing, the words "affecting commerce" are jurisdictional words of art, typically signalling a congressional intent to exercise its Commerce Clause power broadly, perhaps as far as the Constitution permits. See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964) (interpreting statute regulating all activity that "affects [interstate] commerce" as showing congressional intent to reach as far as

the Commerce Clause permits, and holding the Commerce Clause does permit Congress to forbid a policy of segregation even at a local hotel); National Labor Relations Board v. Fainblatt, 306 U.S. 601, 606-07 (1939) (interpreting term "affecting commerce" found in 29 U.S.C. §152(7) broadly to include Congress's full powers under Commerce Clause); H.R. Rep. No. 1107, 93d Cong., 2d Sess. 29-31 (1974) (explaining that purpose of amendment to 15 U.S.C. §45 changing jurisdiction of Federal Trade Commission ("FTC") from activities "in commerce" to activities "in or affecting interstate commerce" is to expand FTC jurisdiction to maximum extent permitted by Commerce Clause), reprinted in 1974 U.S. Code Cong. & Ad. News 7702, 7712-13; H.R. Rep. No. 871, 96th Cong., 2d

Sess. 4-7 (1980) (explaining amendment to §7 of the Clayton Act, 15 U.S.C. §18, changing its coverage from business activities "engaged in" interstate commerce to those "affecting commerce," thereby expanding Clayton Act's coverage to maximum permitted under the Commerce Clause and overrulling United States v. American Building Maintenance Industries, 422 U.S. 271 (1975)), reprinted in 1980 U.S. Code Cong. & Ad. News 2732, 2735-37. See also 15 U.S.C. §78l(g)(1) (1982) (securities regulation); 15 U.S.C. §2006(c)(1) (1982) (automobile labelling); 17 U.S.C. §910(a) (Supp. II 1984) (copyright enforcement); 42 U.S.C. §§6303(c), 6325(d) (1982) (energy conservation); 49 U.S.C. App. §2503(3) (Supp. II 1984) (motor carrier safety).

Moreover, in the modern cases that rest upon an expansive view of Congress's constitutional Commerce Clause powers, the Supreme Court has made clear that the constitutionally necessary effect upon interstate commerce includes the cumulative impact of many instances of single events of the type that Congress sought to regulate. See Heart of Atlanta Motel, 379 U.S. at 254-59, and cases cited therein. Against this background, one can read the language "possess in or affecting commerce, any firearm" as serving a jurisdictional purpose, making clear that Congress wished to exercise its Commerce Clause power broadly in order to achieve a crime-control objective, namely, stopping convicted felons from possessing guns. If so, the effect on commerce to which

Congress refers could include the effect that permitting (or forbidding) a person or persons of this sort to possess interstate guns will have on interstate commerce, Congress's object being to show not necessarily an injury to commerce, but rather simply to show some effect for jurisdictional reasons. As so read, the word "affecting" would include past or present effects; it would include possession of a gun that did travel interstate before the felon possessed it. Scarborough v. United States, 431 U.S. 563 (1975).

For another thing, the legislative history of the statute suggests that Congress intended this very result. The relevant House Judiciary Committee Report,

for example, said that the effect of the new law is to prohibit persons:

> from receiving, possessing, or transporting firearms in interstate or foreign commerce or firearms which have been shipped or transported in interstate or foreign commerce if they are or have been:
>
> (1) under indictment for or convicted of a felony . . . .

H.R. Rep. No. 495, 99th Cong., 2d Sess. 23 (1980) (emphasis added; footnote deleted), reprinted in 1986 U.S. Code Cong. & Ad. News 1327, 1349). Moreover, Congress enacted this statute after the Supreme Court had held that these very words, "possess . . . in commerce or affecting commerce . . . any firearm" carry this interpretation. In Scarborough, 431 U.S. at 563, when interpreting a statutory predecessor of §922(g), §1202(a) of Title VII of the Omnibus Crime Control and Safe

Streets Act of 1968 ("Title VII"), Pub. L. No. 90-351, Title VII, §§1201-03, 82 Stat. 197, 236, repealed by Firearm Owner's Protection Act, Pub. L. No. 99-308, §104(b), 100 Stat. 449, 459 (1986), the Court reconsidered dicta that it had written in United States v. Bass, 404 U.S. 336, 350 (1972), that appeared to give the words a limited meaning. In Bass, 404 U.S. at 350, the Court wrote:

> [f]or example, a person "possesses . . . in commerce or affecting commerce" if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce.

In Scarborough, the Court looked more closely at Title VII's legislative history, quoting, among other things, sponsoring Senator Long's remarks:

> I have prepared an amendment . . . simply setting forth the

> fact that anybody who has been convicted of a felony . . . is not permitted to possess a firearm.
>
> It places the burden and the punishment on the kind of people who have no business possessing firearms in the event they come into possession of them . . . .

114 Cong. Rec. 13868-69 (1968), quoted in Scarborough, 431 U.S. at 572-73. The Scarborough court then rejected the defendant's contentions that Congress did not intend to punish possession of a firearm unless the gun had moved in interstate commerce at or near the time of possession. It held instead that a felon who possessed a gun violated the statute as long as the gun previously had travelled in interstate commerce. Such an interpretation captures the essence of Congress' intent, striking at the possession of weapons by people 'who have

no business possessing [them].'" Scarborough, 431 U.S. at 577 (citation omitted).

Of course, Scarborough considered Title VII, while the statute before us is a later statute. But it is a successor statute to Title VII. The House Judiciary Committee explicitly said that §922(g), the section here at issue:

> combines in one section . . . all of the offenses related to sale of firearms to unqualified persons and offenses of receipt, possession and transport of firearms by unqualified persons (or their employees) now divided between Title I of the Gun Control Act (18 U.S.C.922(d),(g), and (h)) and Title VII of the Omnibus Crime Control and Safe Streets Act (19 U.S.C. 1202 (a) and (b)) . . . .

H.R. Rep. No. 495 at 23 (emphasis in original), reprinted in 1986 U.S. Code Cong. & Ad. News at 1349. An examination of the predecessor statute shows that the

"transport" and "receipt" language (not here at issue) likely came from Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title IV"), Pub. L. No. 90-351, Title IV, §902, 82 Stat, 197, 228, amended by Gun Control Act of 1968, Pub. L. No. 90-618, Title I, §102, 82 Stat. 1216, amended by Pub. L. No. 97-377, Title I, §165(a), 96 Stat. 1923 (1982), amended by Firearm Owner's Protection Act, Pub. L. No. 99-408, §2, 100 Stat. 920 (1986), while the "possession" language came from Title VII. We have no good reason to think that Congress, when picking up the language of Title VII, intended to reject Scarborough's authoritative interpretation, particularly in light of the House Judiciary Report

just quoted and the statute's use of the same language.

Appellant raises two countervailing considerations. He says that to interpret the word "affecting" as including a past affecting or a cumulative affecting is an awkward interpretation of the statute's language. We agree, but Congress's choice of language is understandable. A Congress that wanted to extend §922(g)'s jurisdictional reach to include past, present, and (possibly) future connections with interstate commerce, expanding the crime to include more than just receipt or transport, might have preferred to use a single, highly general word with a history, such as "affecting," rather than to write a far longer statute using several separate clauses in

different tenses, a drafting approach that would have risked generating numerous new judicial interpretations of each additional word.

Appellant also points to the language in Scarborough characterizing Title VII as "not the product of model legislative deliberation or draftsmanship." 431 U.S. at 570 (citation omitted). He adds that the present act was carefully drafted, and that we therefore should not consider Congress to have adopted Title VII's earlier, "loose" interpretation. This argument, in our view, cannot overcome the other considerations we have discussed. We therefore hold that this statutory language applies to a possession of a gun

that previously moved in interstate commerce.

2. Appellant points out that his gun may have arrived in Massachusetts before May, 1986, when Congress enacted the present gun-control law. He argues that application of the law to him thereby violates the Fifth Amendment's ex post facto clause, a clause that forbids Congress to enact any law "'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then proscribed.' Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325-26 (1867)." Weaver v. Graham, 450 U.S. 24, 28 (1981), quoted in United States v. Robinson, 843 F.2d 1, 4 (1st Cir. 1988).

The provision of the 1986 law here at issue, however, does not punish the act of transporting a gun in interstate commerce; the "in or affecting commerce" language, as we have just discussed, describes what kind of a gun felons may not possess, and it provides the jurisdictional basis for a federal law. The act that the law forbids is possession; and the defendant engaged in that act seven months after the law's enactment. United States v. Hopkins, 529 F.2d 775, 777 (8th Cir. 1976) (act made criminal by Title VII is the possession of the firearms, "not interstate transportation of the weapon by someone else"), cert. denied, 431 U.S. 965 (1977), cited in Robinson, 843 F.2d at 6; see alsoUnited States v. D'Angelo, 819 F.2d

1062, 1065-66 (11th Cir. 1987) (also interpreting Title VII); United States v. Woods, 696 F.2d 566, 572 (8th Cir. 1982) (same); cf. United States v. Matassini, 565 F.2d 1297, 1306-07 (5th Cir. 1978) (prior felon provision of Title VII does not violate ex post facto clause); United States v. Sutton, 521 F.2d 1385, 1390-91 (7th Cir. 1975) (same).

Appellant does not claim here that he was not given sufficient time to rid himself of a gun that the May 1986 laws made it unlawful for him to possess. Nor do we see here how he could make such an argument given the seven-month period between the statute's effective date and the date of his arrest, and the fact that his conduct -- possessing the gun -- was, in any event, unlawful long before 1986

(though under different federal statutes with somewhat different punishments).

3. Appellant argues that the indictment is too vague, that it does not "'sufficiently apprise [him] of what he must be prepared to meet.' Russell v. United States, 369 U.S. 749, 763 (1962) (citations omitted)." United States v. Santa-Manzano, 842 F.2d 1, 2 (1st Cir. 1988) (Constitution requires that "the indictment . . . contain the elements of the offense charged" and "fairly inform a defendant of the charge against which he must defend."); see also Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Serino, 835 F.2d 924, 929 (1st Cir. 1987). The indictment here reads as follows:

> On or about December 23, 1986, at or around Saugus, in the District of Massachusetts,

JOHN J. GILLIES, JR.

> defendant herein, having previously been convicted of three or more violent felonies as that term is defined in 18 United States Code Section 924(e)(2), did knowingly possess a firearm, that is: a Rossi .38 caliber revolver, with serial number D355921 which had previously travelled in interstate commerce. All in violation of Title 18, United States Code, Sections 922(g) and 924(e).

The indictment informs the defendant which statute he violated, §922(g); it refers to the specific unlawful act (possession); it refers to the specific gun; it states explicitly the connection with interstate commerce that the government intends to prove; and it tells him which of several different categories of unlawful possessors he falls within, namely, the category of those previously convicted of

a crime "punishable by imprisonment for a term exceeding one year." (The indictment refers to "violent felonies . . . as defined in . . . Section 924(e)(2), " which section defines "violent felonies" in terms of crimes "punishable by imprisonment for a term exceeding one year." See Appendix B.) The indictment also refers to three prior violent felony convictions, the predicate for applying the extra sentence mandated by §924(e). We find the indictment clear enough, and we do not believe the Constitution requires more. Cf. Hamling, supra; Santa-Manzano, supra; Serino, supra.

4. Appellant points out that the 1986 recodification of the federal gun control law separates an elaborate set of

substantive crimes, placed in §922, entitled "Unlawful acts," (Appendix A) from an elaborate set of penalties for committing those acts, placed in §924, entitled "Penalties." (See Appendix B.) Section 924, in subsection (a)(1), provides a maximum penalty of five years imprisonment and a $5,000 fine for violating §922(g)(1), but it goes on, in subsection (e)(1), to provide a fifteen-year minimum term of imprisonment if the defendant has committed three prior violent or drug-related felonies. Appellant argues that §924(e) (see Appendix A) is a "sentencing enhancement" provision -- that it does not create a substantive crime. He next says that, if he had insisted on his right to a jury trial, the

government would have told the jury about his three prior felony convictions unnecessarily (for they had to do only with the sentence, not with the crime). Cf. Government of Virgin Islands v. Castillo, 550 F.2d 850 (3d Cir. 1977) (handgun possession conviction reversed because indictment improperly mentions prior felony conviction relevant only for purposes of separate sentencing enhancement statute). And, he concludes, it was this fear of the government's unnecessarily prejudicing the jury that may have led him to waive his right to a jury trial.

We need not decide whether or not §924(e) is a "sentencing enhancement" statute, for even if we assume appellant is right that references in the indictment

to prior felonies should not have been placed before the jury, see Castillo, 550 F.2d F.2d at 850, United States v. Foskey, 636 F.2d 517 (D.C. Cir. 1980), appellant waived a jury trial, and the fear of prejudice that he mentions could not have affected his waiver decision. The district court told the appellant that it would remove the references from the jury's copy of the indictment if the appellant wished. The appellant, aware of the choice, nonetheless decided to waive a jury trial, and to be tried by a judge, who, irrespective of the type of statute, would be aware of the convictions. Given the court's offer to protect the defendant from jury awareness of his prior record (except insofar as necessary to prove the

elements of §922(g)), we can find no error.

5. Appellant's last contention is that, at the sentencing hearing, the government failed to offer sufficient proof of three prior "violent felony" convictions. §924(e)(2)(B). The government offered proof of several prior convictions, including two for burglary of the same home on successive nights (appellant received concurrent sentences), and two for armed robberies of two different drug stores committed on consecutive days (appellant also received concurrent sentences). He argues, however, that each pair of convictions should count as only one for the purposes of §924(e), because "the statute was intended to reach multiple criminal

episodes that were distinct in time, not multiple felony convictions arising out of a single criminal episode." United States v. Petty, 828 F.2d 2, 3 (8th Cir. 1987), petition for cert. filed, Apr. 5, 1988. The drug store robberies, however, occurred on different days and at different drug stores. Both robberies are distinct from the burglaries, which occurrred three years previously. As result, even if, as appellant suggests, the two burglary convictions stemmed from one "episode" which stretched over New Year's Eve, 1972, the government still proved three "violent felony" convictions as required by §924(e). Accord United States v. Wicks, 833 F.2d 192 (9th Cir. 1987) (two burglary convictions based on burglaries committed in different times in

different places qualify as separate "violent felonies" even though both occurred on same night and defendant received a concurrent sentence), petition for cert. filed, Apr. 16, 1988; United States v. Greene, 810 F.2d 999, 1000 (11th Cir. 1986)(single indictment alleging burglaries of four separate buildings at four separate locations on four different days provides evidence of four separate "violent felonies" for purposes of sentencing enhancement).

For these reasons, the judgment of the district court is

Affirmed.

Appendix A

§922. Unlawful acts

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien, is illegally or unlawfully in the United States;

(6) who has been discharged from the Armed Forces under dishonorable conditions; or

(7) who, having been a citizen of the United States, has renounced his citizenship;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

APPENDIX B

§924. Penalties

(a)(1) Except as otherwise provided in paragraph (2) of this subsection, subsection (b) or (c) of this section, or in section 929, whoever--

> (A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;
>
> (B) knowingly violates subsection (a)(4), (a)(6), (f), (g), (i), (j), or (k) of section 922;
>
> (C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or
>
> (D) willfully violates any other provision of this chapter,

shall be fined not more than $5,000, imprisoned not more than five years, or both, and shall become eligible for parole as the Parole Commission shall determine.

(2) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922, shall be fined not more than $1,000, imprisoned not more than one year, or both, and shall become eligible for parole as the Parole Commission shall determine.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the first section or section 3 of Public Law 96-350 (21 U.S.C. 955a et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law; and

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

The initial response by TAG to the letter was a request that it be permitted to withdraw its licensure application without prejudice, but upon a number of conditions which would have permitted TAG to continue engaging in transactions pursuant to transactional waivers. On June 3, which was after the date of the issuance of the order to show cause in this action, TAG did request a hearing, which request was within time and a hearing will be scheduled in due course.

Meanwhile, on January 29 and February 5, 1987, Boardwalk Regency Corporation, a casino licensee owning and operating Caesar's Atlantic City, filed two petitions which the Commission seeking transactional waivers, allowing it to do business with TAG. Specifically, Caesar's

sought in the petition permission to purchase a total of 29 new slot machines from TAG and also sought leave to purchase certain spare parts from TAG to service machines that Caesar's had previously bought from TAG with the Commission's approval.

The Division of Gaming Enforcement objected to those petitions. The basic reason was that its investigations had shown that TAG was not qualified to be a licensed casino service industry. The reasons are the reasons set forth in the October 1986 letter.

Following the filing of these objections, consideration of Caesar's transactional waiver petition was deferred at Caesar's request. On May 20, 1987 the Commission considered the portion of Caesar's petitions seeking leave to purchase spare

parts from TAG to service slot machines previously purchased from TAG and the Department of Gaming Enforcement did not oppose this portion of the petition.

On May 20, 1987 the Commission granted the spare parts portion of the petition and asked to be advised by Caesar's within ten days whether it wished to proceed with the remaining portion of its petitions, namely the request to purchase new machines from TAG. By letter dated June 3, 1987 the Commission, not having heard from Caesar's, administratively dismissed the petition for failure to prosecute, but without prejudice.

The complaint charges that TAG has been deprived of its constitutional rights because it, as an applicant, has been denied the opportunity of benefitting from the transactional waiver provisions

of the statute, without the opportunity for a hearing or to be heard. It further states that the information in the October 14, 1986 letter is false and that the defendants Parrillo and Stebbins acted with malice and used the expectation and prospect of a gaming license as a means of depriving plaintiffs of a constitutionally protected interest. TAG asserts it has a property right to the transactional waiver and it has a liberty interest in its reputation and a right not to be stigmatized by defendants Parrillo and Stebbins. These are federal rights.

In addition, TAG asserts certain state law claims of common law fraud, malicious interference with business relationships, libel and slander.

On June 1 I signed an order to show cause requiring the defendants to appear and show cause why a preliminary injunction should not be entered enjoining the defendants from interfering with the completion of the plaintiffs' sale to Boardwalk Regency Corporation of the items which were subject to the two transactional waiver petitions, to enjoin the defendants from recommending to the Casino Control Commission denial of transactional waivers prior to a final decision by the Casino Control Commission on the application for licensure of TAG for a casino service industry license, enjoining publication of false statements and innuendos about plaintiffs without correction and enjoining further inter-interference with plaintiffs' constitutional rights and business relationships.

The rule for the granting of a preliminary injunction is that the applicant must show a reasonable likelihood of success on the merits, it must show irreparable injury if the requested relief is not granted, it must weigh the countervailing interest of other parties and it must show that the public interest is served or at least not deserved by the granting of the relief requested.

I conclude that there is not a likelihood of success on the merits in this action. In the first instance, I conclude that the plaintiffs do not have a property interest in the application for transactional waivers which were filed by Caesar's. Under New Jersey Statutes Annotated 5:12-92(a) there is a requirement that all casino service industries offering goods and services to licensed

casinos be licensed in accordance with the provisions of the Act. It is recognized in this statutory provision that casinos may wish to do business or may need to do business with potential service industries before they can be licensed and there is a provision which reads, "Provided, however, that, upon a showing of good cause by casino licensee for each business transaction, the Commission may permit an applicant for a casino service industry license to conduct business transactions with such casino licensee prior to the licensure of that applicant under this subsection."

I conclude that the only person having a property right, if any exists at all, under this section is the casino licensee and not the persons or entities which

seek to do business with the casino licensee.

Here, Caesar's sought a transactional waiver pursuant to this provision and it withdrew the waiver, as it had every right to do, after learning of the recommendation of the Division of Gaming Enforcement that TAG not be licensed pursuant to its application. Let me correct that. Caesar's withdrew by reasons of its inaction after the Commission sought advice from Caesar's whether it intended to proceed.

I would conclude that the service industry applicant had no right to a hearing, that there is no property right of TAG which is implicated by the fact that Caesar's has withdrawn its application and that the Commission therefore has no-

thing before it on the basis of which to make a decision.

Turning to TAG's undoubted interest, which is to be processed in accordance with the statute and to have its application for a license heard and disposed of, the procedures are there, they are available to TAG and should be pursued by TAG. The procedures seem reasonable. They provide for a hearing before an administrative law judge who will hear evidence on the findings of the Division of Gaming Enforcement. Each side will be able to present testimony and exhibits. Afterwards, the administrative law judge will prepare a report, findings of fact and a recommendation for submission to the Commission. The Commission will enter its final decision based on the report and the evidence developed by and

before the administrative law judge. There will then be an opportunity to appeal any decision to the Appellate Division of the New Jersey Superior Court. The procedure is perfectly proper and fair and provides all the parties an opportunity to be heard.

The allegation is made in the complaint that the Division of Gaming Enforcement's report was inspired by malice, is false and malicious. I have read the report, I have read the response with TAG's former attorney made to it, and I see absolutely nothing in the documents themselves which is supportive of a conclusion of malice, falsehood, or the like. If there are errors in the report, there is a process for correcting them. There did not appear and there has been absolutely nothing put in evidence to suggest that this is a de-

liberate, malicious attempt by two individuals, sued here in their individual not their official capacities, to injure the plaintiffs.

Thus, if such a fact were true and if in such a circumstance injunctive relief would be available, the factual basis for such relief has not been laid here and in fact is so sparse that in due course I will hear a summary judgment motion on that particular issue.

This has been a discussion of merits of the application. I conclude that there is no factual basis for the complaint, insofar as constitutional claims are made.

There are two further grounds for denying the preliminary injunctive relief. The first of these arises under the principle

of abstention. It is quite possible, since an application for a hearing had been made, that Younger abstention is applicable. There is an ongoing state proceeding which is judicial in nature, since it is going to an administrative law judge, involving a matter of very great public interest and, consequently, it could well be that Younger abstention is appropriate.

The case of Williams v. Board of Education of Red Bank would be pertinent to that issue. However, I think more to the point in the present case is the abstention which is described in Burford v. Sun Oil Co., 319 U.S. 315 (1943), where federal courts are reluctant to and in fact will not involve themselves in matters involving complex state regulation over a matter of major state importance. The

matter of casino gambling and casino licensing and regulation is a subject which is extremely complex, involving very difficult questions of fact, policy issues and is of extraordinary importance to the State of New Jersey. Therefore, it is within the Burford ambience, in an area which the federal court should enter only for the most compelling reasons and in the most compelling circumstances. This clearly is not one of those reasons and circumstances.

There has arisen this morning a third ground for abstention, which is Pullman abstention. The plaintiff has argued that this potential for detail of an application for licensure by a casino service industry is not a matter which would constitute a lack of good cause under N.J.S.A. 5:12-92(a)(2) and con-

sequently should not be considered by the Commission in deciding whether to grant a transactional waiver. Transactional waiver may be granted, not shall be granted, under the statute upon a showing of good cause by a casino licensee, where it wishes to do business with an applicant for a service industry license.

I interpret the statute to provide that good cause could be negated if it appeared that the licensee applicant would be denied a license by the Commission upon completion of the licensing procedures. Plaintiff disagrees with that. That creates a question of statutory interpretation. A constitutional issue might be avoided, depending on how the state court construed the term good cause. Therefore, this would be a possible grounds for Pullman abstention.

Therefore, for multiple reasons, the preliminary injunction should be denied: there is very little likelihood of plaintiffs' success on the merits; further, it is a matter which the Court should dispose of by abstaining on Younger, Pullman and Burford grounds; and, for those reasons, an order will be entered denying the application.

There is also a motion returnable today to dismiss the complaint. I am going to treat that motion as a motion for summary judgment. If I do so, I do not believe it was filed in time so that sufficient notice has been given to the plaintiffs to respond. Therefore, I will adjourn the summary judgment motion until the regular motion day on July 13. I will adjourn the motion to dismiss which will be treated as a motion for summary judg-

ment to July 13 at 10 o'clock, the regular time and hear it then.

I think perhaps the plaintiffs should review their position and consider whether the best approach is an aggressive attack, aggressive prosecution, of the license application, with accelerated proceedings and the like before the Casino Control Commission.

Anything else we ought to do? No. Mr. Clarke, will you prepare an order?

MR. CLARK: Yes, I will.

MR. HIRSCH: Thank you for hearing us.

(Court adjourned)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil No. 87-2144

TRANS ATLANTIC GAMES, INC.:
et, al.
Plaintiff, :

v. :

W. CARY EDWARDS, et, al. :
Defendant. :

- - - - - - - - - - - - - - - -

TRANSCRIPT OF PROCEEDINGS

O P I N I O N

Newark, New Jersey

July 27, 1987

B E F O R E:

HONORABLE DICKINSON R. DEBEVOISE

UNITED STATES DISTRICT JUDGE

Appearances:

(No appearances.)

This is an action for damages and injunctive relief brought under 42 U.S.C. Section 1983 and New Jersey common law. The plaintiffs are Trans Atlantic Games, Inc. ("TAG"), Howard S. Levin and Sydell R. Kraft, who are both principals of TAG. TAG sells and services slot machines.

The defendants are W. Cary Edwards, named in his official capacity as attorney General of the State of New Jersey, Anthony J. Parrillo, named individually and who is the director of the New Jersey Division of Gaming Enforcement ("the Division"), and R. Lane Stebbins, who is named individually as a Deputy Attorney General of the State of New Jersey.

On June 1, 1987 plaintiffs instituted the present suit. In their initial moving papers plaintiffs sought preliminary

relief enjoining defendants from maintaining their opposition to Caesar's transactional waiver petitions. On the say day I signed an order requiring the defendants to appear and show cause why a preliminary injunction should not be granted. Defendants cross-moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. A hearing was held on June 12, 1987, at which time I denied plaintiff's motion for a preliminary injunction because of the unlikelihood of success on the merits. I indicated that defendant's motion was to be treated as a motion for summary judgment pursuant to Fed. R. Civ. P. 56 and heard on July 13, 1987. The hearing date was subsequently adjourned to July 27, 1987.

Facts

The New Jersey Legislature has enacted the Casino Control Act, N.J.S.A. 5:12-1, et seq., which establishes a Casino Control Commission as the administrative agency charged with regulating the gaming industry in New Jersey. The statute also established within the Department of Law and Public Safety the Division of Gaming Enforcement as the primary enforcement agency under the Act.

The Commission has the responsibility to hear and decide all license, registration, certificate and permit applications and the Division of Gaming Enforcement has the responsibility to investigate all licensure applications to enforce the Act and to prosecute before the Commission all proceedings for violations of the Act.

In June of 1982 TAG applied for licensure as a casino service industry, that is, an industry or agency which could do business with licensee casinos who have been authorized to conduct business under the Act. After the application for TAG's licensure was made the Division of Gaming Enforcement commenced to investigate its qualifications for licensure.

During the pendency of the application and while the Division's investigation was proceeding, various casino licensees petitioned the Commission for permission to transact business with TAG, in accordance with the provisions of N.J.S.A. 5:12-92(a). On numerous occasions the petitions were granted and the casino licensees were authorized to engage in particular transactions with TAG.

By letter dated October 14, 1986 the Division of Gaming Enforcement transmitted to the Commission its report and recommendation with respect to TAG's licensure application. The factual information contained in the report was drawn from the sources through which the Division investigated TAG. It included financial information supplied by the Securities and Exchange Commission, tax filings and information submitted by TAG and by its principals, Mr. Levin & Miss Kraft.

It was the ultimate conclusion of the Division that TAG appeared "unable to demonstrate by clear and convincing evidence its financial stability, integrity and responsibility," as required by N.J.S.A. 5:12-89(b)(1).

By letter dated November 24, 1986 counsel for TAG contested certain of the factual information contained in the Division's letter of October 14, 1986. The Division responded to this letter by advising TAG that the factual disputes were properly the subject of a licensing proceeding before the Commission.

By letter dated May 20, 1987 the Commission advised TAG that in view of the Division of Gaming Enforcement's report of October 14, 1986 there was a substantial possibility that TAG's licensure application would be denied and further advised TAG that it had 15 days in which to request a hearing contesting the matter before the Commission. TAG was further advised that if it did not request a hearing within 15 days its licensure application might be denied by the Commis-

sion. On June 3, TAG did request a hearing, which request was within time, and a hearing will be scheduled in due course.

Meanwhile, on January 29 and February 5, 1987, Boardwalk Regency Corporation, a casino licensee owning and operating Caesar's Atlantic City, filed two petitions with the Commission seeking transactional waivers, allowing it to do business with TAG. Specifically, Caesar's sought permission to purchase a total of 29 new slot machines from TAG and also sought leave to purchase certain spare parts from TAG to service machines that Caesar's had previously bought from TAG with the Commission's approval.

The Division of Gaming Enforcement objected to those petitions. The basic reason was that its investigations had shown that TAG was not qualified to be a

licensed casino service industry. The reasons are the reasons set forth in the October 1986 letter.

Following the filing of these objections, consideration of Caesar's transactional waiver petition was deferred at Caesar's request. On May 20, 1987 the Commission considered the portion of Caesar's petitions seeking leave to purchase spare parts from TAG to service slot machines previously purchased from TAG and the Department of Gaming Enforcement did not oppose this portion of the petition.

On May 20, 1987 the Commission granted the spare parts portion of the petition and asked to be advised by Caesar's within ten days whether it wished to proceed with the remaining portion of its petitions, namely the request to purchase new machines from TAG. By letter dated June

3, 1987 the Commission, not having heard from Caesar's, administratively dismissed the petition for failure to prosecute, but without prejudice.

The complaint charges that TAG has been deprived of its constitutional rights because it, as an applicant, has been denied the opportunity of benefitting from the transactional waiver provisions of the statute, without the opportunity for a hearing or to be heard. It further states that the information in the October 14, 1986 letter is false and that the defendants Parrillo and Stebbins acted with malice and used the expectation and prospect of a gaming license as a means of depriving plaintiffs of a constitutionally protected interest. TAG asserts it has a property right to the transactional waiver and it has a liberty

interest in its reputation and a right not to be stigmatized by defendants Parrillo and Stebbins. These are federal rights.

In addition, TAG asserts certain state law claims of common law fraud, malicious interference with business relationships, libel and slander.

Discussion

While the parties' briefs address plaintiff's claim on the merits, the doctrine of abstention requires that this court refrain from proceeding to a determination of the merits. The abstention doctrine was described by the United States Supreme Court as:

> an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly

> before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court could clearly serve an important countervailing interest.

County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959). See also Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976). This case presents the exceptional circumstances contemplated by the doctrines of Burford and Pullman abstention.

a. Burford Abstention.

Defendants argue that this court should abstain from exercising jurisdiction over the instant case under

Burford v. Sun Oil Co., 319 U.S. 315 (1943). In that case the Supreme Court directed the lower federal courts to abstain from cases with the potential to thrust them into conflict with a state over matters of primary state concern involving the application of detailed regulatory provisions.

The lower courts have defined abstention in greater detail. The Third Circuit in Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission, 791 F.2d 1111, 1115 (3d Cir. 1986) explained that Burford abstention is appropriate in two situations: (1) "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," and (2) where "the exercise

of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

In this case all of the criteria for invoking Burford abstention are clearly present. The regulation of legalized gambling in New Jersey is clearly a matter of substantial public concern. The state legislature enacted a specific provision in the New Jersey Constitution to provide a framework for the establishment and regulation of gambling. Article 4, Section 7, Paragraph (D) provides in part:

> It shall be lawful for the legislature to authorize by law the establishment and operation, under regulation and control by the State, of

> gambling houses or casinos within the boundaries, as heretofore established, of the city of Atlantic City, County of Atlantic, and to lease and tax such operations and equipment used in connection therewith.

Pursuant to that enactment New Jersey has established a comprehensive and complex administrative scheme to carry out its policies with respect to legalized gambling. This court would have to become intricately involved in that scheme if it were to resolve the instant dispute. It would require this court to make detailed and technical judgments about TAG's suitability for licensure under the diverse qualification standards of the Casino Control Act. The decision of whether TAG is qualified to do business in the casino

industry is one that the Casino Control Commission alone should make. The Commission is particularly well-suited to make that decision because it is the body that has been responsible for making such decisions since the inception of legalized gambling in New Jersey.

Within the state system there are procedures available to TAG for resolution of its dispute with the Division. They provide for a hearing before an administrative law judge who will hear evidence on the findings of the Division of Gaming Enforcement. Each side will be able to present testimony and exhibits. Afterwards, the administrative law judge will prepare a report, findings of fact and a recommendation for submission to the Commission. The Commission will enter its final decision based on the report and

the evidence developed by and before the administrative law judge. There will then be an opportunity to appeal any decision to the Appellate Division of the New Jersey Superior Court. The procedure is perfectly proper and fair and provides all the parties an opportunity to be heard.

The situation in the present case is readily distinguishable from that which prevailed in Bally Mfg. Corp. v. Casino Control Commission, 534 F. Supp. 1213 (D.N.J. 1982) in which Judge Brotman of this Court did not abstain on Burford grounds in two suits in which a gambling casino and one of its principals who had been required to divest himself of his interests in the casino challenged certain aspects of the statutory scheme on federal preemption grounds, a matter which could be decided by a federal court

without disrupting the state regulatory scheme. In the present case, or the other hand if the present action were to proceed, it would constitute a proceeding parallel to the state proceedings, each, in effect, seeking to determine if there is evidence of TAG's financial reliability.

Intervention in this matter by the federal courts would disrupt the State's regulatory system and interfere with efforts to conduct a coherent policy in this area.

b. Pullman Abstention.

Additionally, as established by Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) and its progeny, lawsuits "presenting a federal constitutional issue which might be mooted or

presented in a different posture by a state court determination of pertinent state law" are appropriate for abstention. Colorado River, 424 U.S. at 814, quoting Mashuda, 360 U.S. at 189. The Third Circuit parsed this doctrine's special requirements as follows:

> First, there must be uncertain issues of state law underlying the federal constitutional claims brought in the federal court. Second, these state law issues must be amenable to an interpretation by the state courts that would obviate the need for or substantially narrow the scope of the adjudication of the constitutional claims. And third, it must appear that an erroneous decision of state law by the federal

court would be disruptive of important state policies.

D'Iorio v. County of Delaware, 592 F.2d 681, (3d Cir. 1978).

In the present case, all of the elements required by D'Iorio are present. N.J.S.A. 5:12-92(A)(2) has been read by the defendants to grant complete discretion to the Commission when considering petitions for transactional waivers. On the other hand, plaintiff argues that the statute does not permit the Commission to use information gathered by the Division of Gaming Enforcement when making its decision. Clearly a New Jersey state court resolution of the ambiguity in the statute, if there be any at all, could substantially narrow or obviate the need for adjudication of the constitutional claim. If, for example, a state court were to

hold that the statute does confer complete discretion on the Commission to grant or refuse petitions for transactional waivers, then the exercise of that discretion could hardly be considered to violate plaintiff's due process rights.

Additionally, an erroneous decision by a federal court on this issue would certainly disrupt important state functions as already noted in the context of Burford abstention.

Hence, an ambiguity exists in the state statute which, if clarified by a state court, could obviate the need for federal intervention. At the same time, any federal intervention would inappropriately disrupt the application of a coherent state policy. Therefore, abstention under the doctrine of Pullman is also mandated. Bally Mfg. Corp., v. Casino Con-

trol Commission, supra; Hotel and Restaurant Employees & Bartenders v. Read, 597 F. Supp. 1431 (D.N.J. 1984).

Given the applicability of Pullman and Burford abstention, it is unnecessary to determine if dismissal is required by principles of Younger abstention.

Conclusion

For the foregoing reasons, I conclude that federal judicial intervention should be withheld under the doctrines of Burford and Pullman abstention. The defendants' motion for summary judgment will be granted. I shall adapt and sign the order which accompanied defendants' motion to dismiss.

ENTERED

on

THE DOCKET

on 7-27 1987

WILLIAM T. WALSH. CLERK

By s/ S. Jansen (Deputy Clerk)

FILED

JUL 27 1987

AT 1^00 P.

WILLIAM T. WALSH. CLERK

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

TRANS ATLANTIC GAMES, INC., et al.,
Plaintiffs,

v.

W. CARY EDWARDS, et al.,
Defendants.

Civil Action No. 87-2144

For

Summary Judgment

This matter having been opened to the Court on defendants' cross-motion for dismissal of the action pursuant to Fed.R.Civ.P. 12(b)(6), which the Court has treated as a motion for summary judgment and the Court having considered the papers submitted by the parties and heard oral argument on Thursday, July 27, 1987, and for the reasons set forth in a bench opinion.

IT IS on this 27th day of July, 1987, ORDERED that defendants' cross-motion for summary judgment in their favor be and hereby is granted with costs.

s/ Dickinson R. Debevoise

Hon. Dickinson R. Debevoise, U.S.D.J.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1. Dec. 29, 1979, 93 Stat. 1284.

N.J.S.A. 5:12-92. Licensing and registration of casino service industries

a. (1) All casino service industries offering goods or services which directly relate to casino or gaming activity, including gaming equipment manufacturers, suppliers and repairers, schools teaching gaming and either playing or dealing techniques, and casino security services, shall be licensed in accordance with the provisions of this act prior to conducting any business whatsoever with a casino applicant or licensee, its employees or agents, and in the case of a school, prior to enrollment of any students or offering of any courses to the public whether for compensation or not; provided, however, that upon a showing of good cause by a casino applicant or licensee for each business transaction,

the commission may permit an applicant for a casino service industry license to conduct business transactions with such casino applicant or licensee prior to the licensure of that service industry applicant under this subsection.

(2) In addition to the requirements of paragraph (1) of this subsection, any casino service industry intending to manufacture, sell, distribute or repair slot machines within New Jersey, other than antique slot machines as defined in N.J.S. 2C:37-7, shall be licensed in accordance with the provisions of this act prior to engaging in any such activities provided, however, that upon a showing of good cause by a casino applicant or licensee for each business transaction, the commission may permit an applicant for a casino service industry

license to conduct business transactions with the casino applicant or licensee prior to the licensure of that service industry applicant under this subsection; and provided further, however, that upon a showing of good cause by an applicant required to be licenses as a casino service industry pursuant to this paragraph, the commission may permit the service industry applicant to initiate the manufacture of slot machines or engage in the sale, distribution or repair of slot machines with any person other than a casino applicant or licensee, its employees or agents, prior to the licensure of that service industry applicant under this subsection.

b. Each casino service industry in subsection a. of this section, as well as its owners, management and supervisory

personnel and other principal employees must qualify under the standards, except residency, established for qualification of a casino key employee under this act. In addition, if the business or enterprise is a school teaching gaming and either playing or dealing techniques, each resident, director, instructor, principal employee, and sales representative employed thereby shall be licensed under the standards established for qualification of a casino employee under this act; provided, however, that nothing in this subsection shall be deemed to require, in the case of a public school district or a public institution of higher education, the licensure or qualification of any individuals except those instructors and other principal employees responsible for the teaching of playing or dealing techniques. The commission,

in its discretion, may issue a temporary license to an applicant for an instructor's license upon a finding that the applicant meets the educational and experiential requirements for such license, that the issuance of a permanent license will be restricted by necessary investigations, and that temporary licensing is necessary for the operation of the gaming school. Unless otherwise terminated pursuant to this act, a temporary license issued pursuant to this subsection shall expire six months from the date of its issuance and be renewable, at the discretion of the commission, for one additional six-month period.

c. All casino service industries not included in subsection a. of this section shall be licensed in accordance with rules of the commission prior to commen-

cement or continuation of any business with a casino applicant or licensee or its employees or agents. Such casino service industries, whether or not directly related to gaming operations, shall include suppliers of alcoholic beverages, food and nonalcoholic beverages; garbage handlers; vending machine providers; linen suppliers; maintenance companies; shopkeepers located within the approved hotels; and limousine services and construction companies contracting with casino applicants or licensees or their employees or agents. The commission may exempt any person or field of commerce from the licensing requirements of this subsection if the person of field of commerce demonstrates (1) that is regulated by a public agency or that it will provide goods or services in insubstantial or insignificant amounts or

quantities, and (2) that licensing is not deemed necessary in order to protect the public interest or to accomplish the policies established by this act. Upon granting an exception or at any time thereafter, the commission may limit or place such restrictions thereupon as it may deem necessary in the public interest, and shall require the exempted person to cooperate with the commission and the division and, upon request, to provide information in the same manner as required of a casino service industry licensed pursuant to this subsection; provided, however, that no exemption be granted unless the casino service industry complies with the requirements of sections 134 and 135 of this act.[1]

[1]Sections 5:12-134, 5:12-135

d. Licensure pursuant to subsection c. of this section of any casino service industry may be denied to any applicant disqualified in accordance with the criteria contained in section 86 of this act.[2]

L.1977, c. 110, § 92, eff. June 2, 1977. Amended by L.1978, c. 7, § 20, eff. March 17, 1978; L.1979, c. 282, § 27 eff. Jan. 9, 1980; L.1980, c. 28, § 7, eff. May 20, 1980, operative May 14, 1981; L.1981, c. 195, § 3, eff. July 8, 1981; L.1981, c. 503, § 13, eff. Jan. 12, 1982; c. 57, § 2, eff. July 6, 1982; L.1987, c. 355, § 5, eff. Jan. 4, 1988.

[2]Section 5:12-86